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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 730

FOREIGN TRADE MANAGEMENT COMPANY, INCORPORATED,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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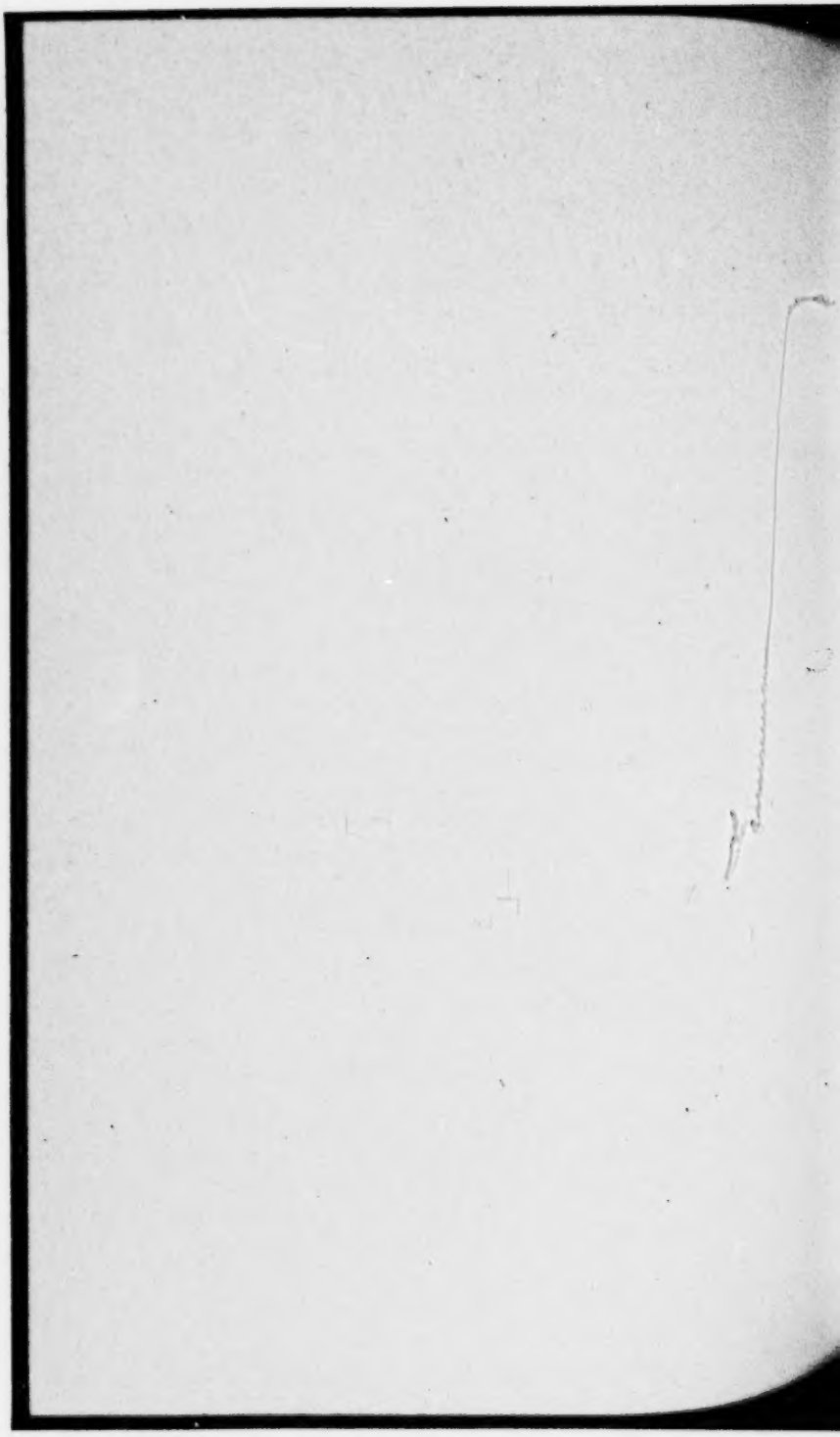

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No. 730

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vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petition of Foreign Trade Management Company, Incorporated, a corporation, respectfully shows to this Honorable Court:

I

Statement of the Matter Involved

In May, 1942, petitioner, a New York corporation engaged in the importing and exporting business in New York City, brought to the United States from Portuguese East Africa, where petitioner had purchased it, 1460 long tons of copra (Fdg. 2, R. 4).

This copra was shipped to the United States "in transit" for export to petitioner's South American customers under contracts previously entered into with these customers (Fdg. 2, 10, R. 4, 7). When the copra arrived in New York, it was immediately shipped by railroad to New Orleans, Louisiana, for shipment to South America (Fdg. 2, 9, R. 4, 7).

When the petitioner purchased the copra in Portuguese East Africa and shipped it from Portuguese East Africa, petitioner had export licenses[1] from the Board of Economic Warfare permitting the exportation of 5,000 tons of copra to South America (Fdg. 10, R. 7). Because, on April 10, 1942, the Board of Economic Warfare by general order had rescinded all export licenses, which had been in effect for more than six months, petitioner had export licenses for the exportation of only 1050 long tons when the copra arrived in New York on May 19, 1942 (Fdg. 10, R. 7). However, after the copra had been shipped to New Orleans, the Board of Economic Warfare granted to petitioner new licenses for the exportation of 1450 long tons and cancelled the licenses for the exportation of the 1050 long tons. Four days after those export licenses were granted and while petitioner's copra was in course of being shipped to South American countries pursuant to contracts previously entered into, the licenses were cancelled (Fdg. 11, 12, R. 7, 8). Petitioner attempted to obtain reinstatement of its licenses and also filed a new application for licenses but all these requests were denied[2] (Fdg. 11, R. 7).

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[1] Licenses were required for the exportation of copra as well as many other commodities under the provisions of the Act of July 2, 1940, (c. 508, 54 Stat. 714; U. S. Code Annotated Title 50 Appendix, Sec. 701).

[2] The Court of Claims found (R. 7-8) that petitioner's requests for licenses were denied both because petitioner had represented in its application for licenses that the value of the copra was considerably less than the price at which it had contracts to sell it and also because *it had been reported* to the official revoking the licenses that the consignees were on

On July 24, 1942, respondent took into its possession 610 long tons of this copra pursuant to a requisition dated July 17, 1942, issued by the Board of Economic Warfare under authority of the Act of October 10, 1940, as amended by the Act of July 2, 1942 (c. 836, 54 Stat. 1091; c. 471, 56 Stat. 467; Section 711, Title 50, Appendix, U. S. Code, Annotated), and on August 7, 1942, the remainder of the copra was taken into possession of the respondent pursuant to a requisition dated July 31, 1942, issued by the same agency under the same authority (Fdg. 5, R. 5). The lower court found that the respondent under these two requisitions took 1422.223 long tons of petitioner's copra (Fdg. 5, R. 5).

Petitioner sold copra only in the foreign market and the copra for which compensation is sought in this case was brought to the United States in transit solely for delivery to South American customers to whom it had been sold (Fdg. 9, R. 7).

There was a market for copra in Colombia, Venezuela and Mexico and petitioner bought the requisitioned copra for sale in some of these countries (Fdg. 9, R. 7). Because

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the proclaimed list, which was a list of persons who the Government had reason to believe were dealing with our enemies.

Whatever may have been reported to the revoking officer, the consignees were not on the proclaimed list (1 Tr. 31) and the respondent made no effort to prove the presence of the consignees' names on the proclaimed list and made no reference to any proclamation, which is a public document, which contained the names of the consignees.

Petitioner had stated in its application the value of the copra less than the sales price because of a confusion as to the forms to be used in making the application. Petitioner understood that a nominal price of the copra was to be stated rather than the sales price (1 Tr. 42). Furthermore, the Board of Economic Warfare had before it in petitioner's brief submitted in support of the applications for licenses a full statement of what the petitioner expected to receive upon the sale of the copra (Exhibit 55; the Commissioner of the Court of Claims excluded this exhibit from evidence but under the rules of the Court of Claims it was marked for identification and was before the Court when it considered the case).

there were no ships plying between African and South American ports at this time, the copra had to be brought to the United States in transit and reshipped to South America (Fdg. 9, R. 7).

Petitioner had applied for and been granted by the United States Maritime Commission, an import shipping priority rating under the terms of the Act of July 14, 1941, (c. 297, 55 Stat. 591; U. S. Code Title 50, Secs. 1281-1286), which provided it with shipping space to enable it to bring the copra from Portuguese East Africa (Plaintiff's Exhibit 8 and 1 Tr. 16 *).

Because this copra was destined for purchasers in Colombia and Venezuela, the diplomatic representatives of those countries in Washington co-operated in efforts to secure this shipping space (Plaintiff's Exhibits 5 and 6 and 1 Tr. 13-14). The Co-ordinator of Inter-American Affairs in the Office of Emergency Management for the Executive Office of the President likewise used his efforts to secure shipping space so that the copra might be brought to the Western Hemisphere in transit to South America (Plaintiff's Exhibit 7, 1 Tr. 13-14). Petitioner had applied for shipping priority rating for 10,000 long tons of copra (1 Tr. 17). The Maritime Commission allocated to petitioner space for 2500 long tons (1 Tr. 16). Subsequently the Maritime Commission gave instructions to the shipping companies that petitioner's cargoes of copra were to be unloaded at Trinidad, British West Indies, for reshipment to South America (1 Tr. 18). Later, at the request of the Board of Economic Warfare, the arrangement for unloading at Trinidad was abandoned and the steamship companies were instructed by the Maritime Commission to bring the cargoes to New York.

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* The letter "R" followed by a number refers to a page in the printed record. The letters "1 Tr." followed by a number refer to the volume and page of the transcript which was not printed in accordance with stipulation of the parties.

These instructions were given because the Board of Economic Warfare was considering the requisitioning of all the copra (1 Tr. 23-28 and Plaintiff's Exhibit 53).

At the time petitioner secured shipping space, it had already purchased 7000 long tons of copra in Portuguese East Africa (Plaintiff's Exhibit 1 and 1 Tr. 5-8). Under there arrangements, petitioner shipped 2500 long tons of copra to the United States in transit from Portuguese East Africa. On the *S. S. Hawaiian* 1460 long tons were shipped (Fdg. 2, R. 4).

The 1460 long tons of copra which was the cargo of the *S. S. Hawaiian* is the copra involved in this case. The 840 long tons which was the cargoes of the *S. S. Puerto Rican* and the *Excello* is the copra involved in the companion case now before this Court in No. 731.

At the time the copra was shipped from Portuguese East Africa, petitioner had contracts to sell to South American customers between 6000 and 7000 long tons of Portuguese East African copra (Fdg. 10, R. 7).

At the time petitioner's export licenses for the export of the 1450 long tons were cancelled as described above, petitioner was in course of shipping the copra pursuant to contracts between it and two of its South American customers. One of these contracts, dated June 9, 1942, was for 1450 long tons of copra at $182 per long ton f.o.b. New Orleans, and the other was a contract for 610 long tons at $196.36 per long ton f.o.b. New Orleans (Fdg. 12, R. 8).

Because the shipping space allotted to petitioner permitted bringing only a limited amount of copra from Africa, petitioner was prepared at this time to send only 840 long tons to the first customer and 610 long tons to the second mentioned customer (Fdg. 12, R. 8). The first customer had established a letter of credit for 585 long tons at $206

per long ton, which included freight from New Orleans to Venezuela (Plaintiff's Exhibit 30, 1 Tr. 21a). This letter of credit was for less than the amount ordered by this customer because petitioner could get shipping space from New Orleans to Venezuela for only that amount of copra (1 Tr. 21b and Plaintiff's Exhibit 38). The second customer had established a letter of credit at the Irving Trust Company in New York for $41,235.60, which was the entire purchase price at $196.36 per long ton to cover the purchase of 210 long tons of its order (1 Tr. 22, and Plaintiff's Exhibit 39). Conditioned upon the shipment by petitioner of the 210 long tons, this customer would be able to secure credit to obtain delivery of the 400 additional long tons of its order (Plaintiff's Exhibits 37, 38, and 39, and 1 Tr. 22). This credit was never established because of the requisitioning by the respondent of the 210 long tons (1 Tr. 22). The purchasers were financially able and willing for the contracts to be fulfilled (Fdg. 12, R. 8).

In May 1942 the Fats and Oils Committee of the Combined Food Board issued regulations as to the purchase and allocation of all fats and oils throughout the world, except certain African copra and Honduran copra. Under the provisions of this arrangement, the British Government became the exclusive purchasers of copra and coconut oil in British Empire countries and Africa, except the Portuguese colonies, and the United States became the exclusive purchaser in French Oceania, South Pacific, South America, Ceylon, and Liberia. All purchases in the United States zone were made by the United States Government itself, acting through the Commodity Credit Corporation. Sales to private parties were prohibited. The only place in which copra could be obtained by private parties for sale in the United States or in South America was Portuguese East Africa and Honduras (Fdg. 17, R. 9).

After the Commodity Credit Corporation bought the copra, it sold it to crushers who were required to extract therefrom the coconut oil, and resell the oil to the Government at established ceiling prices (Fdg. 18, R. 9).

All sales of copra by the Commodity Credit Corporation were at the price of $106.25 per long ton, but no ceiling price was ever placed on sales of copra on the domestic market but a ceiling price of 8 cents a pound was placed upon the sale of oil obtained from the copra (Fdg. 18, R. 9).

After petitioner's copra was requisitioned, it filed its petition with the Compensation Board, Office of Export Control, Board of Economic Warfare, claiming compensation for the copra requisitioned and asserting just and fair compensation to be the price at which it had sold the copra to customers in Venezuela and Colombia, namely, $196.36 per long ton for the 610 long tons taken on July 24, 1942, and $182.00 per long ton for the remainder requisitioned on August 7, 1942 (Fdg. 6, R. 5-6).

On May 15, 1943, the Compensation Board determined fair and just compensation for the copra to be $155,957.33, of which amount the sum of $4,846.14 was compensation for delay in making payment computed on the amount awarded at the rate of 5% per annum from August 7, 1942, to May 1, 1943. The principal amount of the award was computed on the basis of $106.25 per long ton for 1422.223 long tons (Fdg. 6, R. 5-6).

The copra was subject to liens in the total amount of $123,879.09 (Fdg. 4, R. 5). The Board of Economic Warfare determined that the amounts of these liens should be paid to the holders thereof and that the remainder, $32,078.24, should be paid to the petitioner. The lien holders were paid in full (Fdg. 8, R. 6).

On March 30, 1943, petitioner advised the respondent through the Requisitioning Division, Office of Export Con-

trol, Board of Economic Warfare, that it elected to reject the award of compensation as inadequate and requested immediate payment of 50% of the award, namely, $16,039.12. This 50% was paid to the petitioner on April 28, 1943 (Fdg. 8, R. 6).

Suit by the petitioner to secure a determination of just compensation for its copra was instituted in the Court of Claims (R. 1-3).

The Court of Claims held, following this Court's decision in *United States* v. *New River Collieries Company*, 262 U. S. 341, that because petitioner was dealing only in the export market, just compensation for petitioner's copra was the export market price and that that price would have been the price at which petitioner had actually sold the copra if petitioner "had not been prohibited from consummating" the sale by the revocation of its export licenses (R. 13).

The lower court further held (R. 13) that since some but not all of the exports of copra were prohibited, petitioner was entitled to recover the export price of the copra, determined, however, otherwise than by reference to the price for which it had actually sold this copra in the export market.

The lower court then determined that the export price which petitioner was entitled to recover was $145.00 per long ton, which was the price for which petitioner had contracts to sell copra in November 1941 and January 1942, six and eight months respectively prior to the date of requisition (R. 14).

The lower Court found that during 1942 a price of $145 per long ton was readily obtainable on the South American market (Fdg. 16, R. 9). This is unquestionably true because the evidence conclusively shows that, whereas petitioner had contracts in January, 1942, for the sale of copra in the South American market at $145 per long ton, f.o.b. New York, the price of copra on the South American mar-

ket rapidly rose until in the middle of 1942, when the copra involved in the case at bar was requisitioned, it was selling at from $182 to $196 per long ton. The copra in the case at bar had been actually sold in part for $182 per long ton and in part for $196.36 per long ton. There is also evidence in the record that this was the South American market price in the middle of 1942 (Plaintiff's Exhibits 45 and 52; Fdg. 14, (R. 9). It cannot therefore be said that the Court's finding that the price of $145 per long ton was readily obtainable in the South American market in 1942 is incorrect, because, of course, it would be readily obtainable with prices rising and reaching much higher levels than that amount. The actual fact, however, is that the price of $182 to $196 per long ton was readily obtainable as the year went on.

Furthermore, the price of copra continued to rise until during 1944 it reached $245 per long ton. Respondent issued a license in 1944 to a subsidiary of the petitioner for the shipment of 1,000 tons of copra to Colombia at $240 per long ton (Fdg. 15, R. 9).

II

Statute Involved

Section 2 of the Act of October 10, 1940, c. 836, 54 Stat. 1091; Section 712, Title 50, Appendix, Code of Laws of the United States of America:

> "Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such

owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41 (20) and 250, Title 28, of the Code of Laws of the United States of America: *Provided*. That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages."

III

Questions Presented

1. When the petitioner sold copra only in the foreign market and brought copra which it had purchased in Portuguese East Africa to the United States, in transit, solely for sale in South America, was the petitioner entitled to receive as just compensation for its copra, when respondent requisitioned it, the export market price?

2. If petitioner was entitled to receive as just compensation for its copra the export market price, was it entitled to receive as just compensation the amount for which it had sold the copra in the export market, which amount was an amount readily obtainable in the export market, irrespective of the fact that respondent revoked its export licenses shortly before it requisitioned the copra; or may respondent by revoking petitioner's export licenses before requisition change the measure of just compensation for the copra from what petitioner would have actually received had it been permitted to export the copra to an amount for which copra was sold in the export market a considerable period of time prior to the time of requisition?

IV

Reasons and Errors Relied upon for the Allowance of the Writ

It is respectfully submitted that this Court should grant the writ of certiorari and review the decision of the United States Court of Claims for the following reasons:

1. The lower court has incorrectly applied the decision of this Court in *United States* v. *New River Collieries Company*, 262 U. S. 341, in holding that while petitioner was entitled to recover as just compensation for its copra the export price thereof, it was not entitled to the export price for which it had actually sold this copra to customers in South America and to whom it was in course of being shipped, because respondent had revoked petitioner's export licenses shortly before requisition thus preventing it from making delivery of the copra to its customers.

2. This Court should determine whether or not the respondent, by the exercise of its sovereign power to revoke petitioner's licenses to export specific quantities of copra which had been sold to specific customers for specific prices, may prevent petitioner, when the respondent requisitions the copra, from recovering as just compensation the amount for which the copra had been sold by petitioner to those customers; which amount was approximately the amount for which offers to purchase and sell copra in the foreign market were at the time being made; and which amount the court below held would have been just compensation for the copra had revocation of the export licenses not prevented delivery in this particular sale.

3. The lower court erred in deciding in substance that respondent could change the measure of just compensation for petitioner's copra by the expedient of preventing its

delivery by revoking export licenses, and thus acquire the copra for a much less amount than it would have had it requisitioned the copra without revoking the export licenses.

4. The lower court erred in not deciding and holding that plaintiff was entitled to recover as just compensation for its copra $196.36 per long ton for 610 long tons of the copra and $182 per long ton for 812.223 long tons, the price at which the copra had been sold, or a total of $267,604.18, with compensation for delay in payment computed at 4% per annum upon this amount from July 24, 1942, to April 28, 1943, and compensation at the same rate upon $127,685.97 from April 28, 1943, to date of payment, less $139,919.21.

V

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and of the proceedings in the case numbered and entitled on its docket Number 45,915, *Foreign Trade Management Company, Incorporated, Plaintiff*, v. *United States of America, Defendant*, and that said judgment of the United States Court of Claims may be reversed by this Honorable Court with directions to award petitioner, as just compensation for petitioner's copra requisitioned by respondent, $196.36 per long ton for 610 long tons and $182 per long ton for 812.223 long tons, or a total of $267,604.18, with compensation for delay in payment computed at 4% per annum upon said amount from July 24, 1942 to April 28, 1943, and compensation at the same rate upon $127,685.97 from April 28, 1943, to date of payment, less $139,919.21, and that your

petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

FOREIGN TRADE MANAGEMENT
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 730

FOREIGN TRADE MANAGEMENT COMPANY, INCORPORATED,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Claims has not been reported, but will be found at page 12 of the record.

II

Jurisdiction

The date of the judgment to be reviewed is December 1, 1947 (R. 15).

The jurisdiction of this Court is invoked under the provisions of Sec. 3 (b) of the Act of February 13, 1925, c. 229,

43 Stat. 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752; Title 28, Sec. 288, U. S. Code.

On December 23, 1947, the Chief Justice of the United States ordered the time for filing the petition for writ of certiorari extended to and including April 15, 1948 (R. 18, Act of February 13, 1925, Sec. 8, c. 229, 43 Stat. 940; Sec. 350 U. S. Code, Title 28).

III

Statement of the Case

Because the case has been fully stated in the petition for writ of certiorari, *supra,* to avoid repetition, a statement of the case is omitted in this brief.

IV

Question Involved

When petitioner, a dealer in copra only in the foreign market, in May, 1942, brought Portuguese East African copra to the United States, in transit, solely for export to customers in South America, to whom it had been sold and to whom it was in course of being shipped when respondent cancelled petitioner's export licenses, was petitioner entitled to receive as just compensation therefor the export market price for which it had sold the copra, when the respondent shortly after the cancellation of the export licenses requisitioned and took possession of the copra?

V

Specification of Errors to Be Urged

1. The United States Court of Claims erred in deciding and holding that the cancellation by respondent of the export licenses, which had been granted to petitioner to permit it to ship its copra to customers in South America and to

whom petitioner was in course of shipping the copra when the licenses were cancelled, thereby eliminated the price for which petitioner had sold the copra as evidence of or a measure of just compensation, when the respondent, in the exercise of its sovereign power, shortly thereafter requisitioned the copra.

2. The United States Court of Claims erred in not deciding and holding that the petitioner was entitled to receive as just compensation for its copra when the same was requisitioned by the respondent, the amount for which it had theretofore actually sold the copra to its customers in South America.

3. The United States Court of Claims erred in deciding and holding that the price for which petitioner had actually sold its copra and which would otherwise have been evidence of and the measure of just compensation for petitioner's copra, ceased to be evidence of and the measure of just compensation when the respondent, acting in its sovereign capacity, revoked petitioner's export licenses, thus preventing it from making delivery of the copra, and immediately thereafter, acting in its sovereign capacity, took petitioner's copra for public use.

VI

ARGUMENT

Summary of Argument

Point A. Petitioner having purchased the copra, which was requisitioned, solely for export to customers in South America, was entitled to receive as just compensation when the copra was taken for public use, the export price at the time of requisition, *United States* v. *New River Collieries Company*, 262 U. S. 341.

Point B. The export price of the copra at the time petitioner's copra was requisitioned was the amount for which petitioner had theretofore actually sold the copra to customers in South America, namely, $196.36 per long ton, f. o. b. New Orleans, for 610 long tons of the amount requisitioned, and $182.00 per long ton, f. o. b. New Orleans, for 812.223 long tons of the amount requisitioned. These were the contract prices for which the copra had been sold and were within the range of prices for which copra could be sold in the South American market. The cancellation of petitioner's export licenses, which permitted it to export the copra to its customers, did not change the value of the copra for export purposes. This merely prevented the consummation of this particular sale. Respondent itself could have sold the copra in the export market for the same price petitioner had sold it prior to requisition. The facts in this case do not require or justify the application of the rule laid down by this Court in *Horowitz* v. *United States*, 267 U. S. 458, and *Omnia Commercial Company* v. *United States*, 261 U. S. 502, in which this Court held that indirect damage caused by the lawful exercise of sovereign power does not constitute a taking of property for public use or give rise to a cause of action for damages.

Point A

Petitioner Is Entitled to Recover the Export Market Price at Time of Requisition of the Copra Requisitioned by Respondent.

Petitioner is entitled to recover the export market price at time of requisition of the copra requisitioned by the respondent, *United States* v. *New River Collieries Company*, 262 U. S. 341.

The Court of Claims has found (Fdg. 9, R. 7) that petitioner sold copra only in the foreign market and that the

copra for which compensation is sought was brought to the United States, in transit, solely for sale in South America (Fdg. 9, R. 7).

Petitioner had purchased the copra in Portuguese East Africa (Fdg. 2, 10, R. 4, 7); and had, with the co-operation and assistance of the diplomatic representatives of the countries in South America to which it was to be shipped and of the Co-ordinator of Inter-American Affairs, obtained from the Maritime Commission shipping space so that the copra might be brought to the United States, in transit, to South America (1 Tr. 18); and had secured from the Board of Economic Warfare prior to the shipment of copra from Africa, export licenses permitting the export of the copra from the United States (Fdg. 10, R. 7); and when the larger portion of these licenses was revoked by general order of the Board of Economic Warfare, had applied for and received other licenses permitting the export of the copra (Fdg. 11, R. 7).

In the course of its efforts to transport the copra to its South American customers, petitioner had made arrangements to unload the copra at Trinidad, British West Indies, for reshipment to South America. The Board of Economic Warfare, because it was considering requisitioning the copra, brought about the cancellation of these plans so that the copra would be brought into continental United States (1 Tr. 23-28, Plaintiff's Exhibit 53).

Petitioner's export licenses were cancelled (Fdg. 11, R. 7) and its copra was requisitioned by the respondent while petitioner was in course of shipping the copra to customers in South America pursuant to contracts between petitioner and two customers, one of which contracts provided for a sale price of $182.00 per long ton for 840 long tons being shipped, and the other a sales price of $196.36 per long ton for 610 long tons being shipped (Fdg. 12,

R. 8). Letters of credit on New York to cover the price of a large part of the copra had been established by the customers (Plaintiff's Exhibits 30 and 39).

This Court, in *United States* v. *New River Collieries Company* 262 U. S. 341, held that where the owner of property is dealing with it chiefly in the export trade, just compensation for the property when it is taken by the sovereign, is the export market price. This Court stated the rule for the determination of just compensation as follows:

> "The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied, if its property had not been taken."
>
> • • • • • • •
>
> "The owner was entitled to what it lost by the taking."

The Court of Claims recognized the doctrine in *United States* v. *New River Collieries Company, supra,* and held that petitioner was entitled to receive as just compensation for its copra the export market price, but further held that the price at which petitioner had sold the copra to its South American customers could not be considered the export market price nor evidence thereof, because petitioner's export licenses permitting it to deliver the copra had been revoked, (R. 13).

Petitioner did not receive "The full money equivalent" of its property and it was not "Put in as good position pecuniarily as it would have occupied, if its property had not been taken." Nor did petitioner receive "What it lost by the taking."

The lower court disregarded other evidence of export market price because delivery under contracts for purchase and sale which evidenced the price had not been made, be-

cause of failure to obtain shipping facilities (Fdg. 14, R. 9).

The Court found that the export price was $145.00 per long ton because petitioner had sold and delivered other copra for that price to South American customers six months prior to the time the copra in the case at bar was requisitioned (R. 14).

The Court of Claims found that during 1942, $145.00 a long ton was readily obtainable on the South American market (Fdg. 16, R. 9). This would, of course, palpably be true when it clearly appears that petitioner had contracts for the sale of copra on the South American market at $196.00 per long ton which was the price the evidence shows that customers were willing and seeking to pay. This was not an unusual price in the light of all the circumstances because it appears that the price of copra had steadily risen from its pre-war price of $36.50 per long ton (Fdg. 20, R. 10) and that subsequent to the requisition in this case the price of copra rose until in 1944 the export price was $245.00 per long ton, and the respondent was issuing export licenses permitting the export of copra at such prices (Fdg. 15, R. 9).

Point B

The Revocation of Petitioner's Export Licenses Did Not Change the Value of Petitioner's Copra for Purposes of Just Compensation.

The revocation of petitioner's export licenses did not change the value of petitioner's copra for purposes of just compensation. The Court of Claims held that because petitioner was, by act of respondent in cancelling the export licenses, unable to ship its copra and thus receive the sale price under its contracts, that sale price ceased to be the measure or evidence of just compensation for peti-

tioner's copra. The court, however, stated that except for the revocation of the licenses which thereby deprived petitioner of delivering its copra, the prices at which petitioner had actually sold the copra would have established just compensation (R. 13).

There is no evidence that the price for which plaintiff had sold the copra was not reasonable and the evidence shows that the purchasers in South America were willing and ready to pay prices as high as plaintiff's (Plaintiff's Exhibits 45 and 52). Furthermore, the price of copra had been advancing since before the war. Thereafter the price of copra increased greatly (Fdg. 15, R. 9).

The reasoning of the lower court is that because petitioner, having been deprived of its licenses by respondent, could not deliver the copra to its customers and receive the price therefor, that price was not indicative of, nor evidence of, the value of the copra. The court then proceeded to hold that because petitioner had sold other copra six months prior to the time in question for $145.00 per long ton, that value constituted just compensation because, as the court presumably reasoned, customers would have been very happy to secure copra at $145.00 per long ton when they were willing to contract and had contracted to pay $182.00 and $196.00 per long ton.

The court so reasoned despite the fact that the evidence demonstrated and the court so found that the price of copra steadily rose from its pre-war price of $36.50 per long ton (Fdg. 20, R. 10) to $245.00 per long ton in 1944 (Fdg. 15, R. 9).

Although not stated in *haec verba*, the theory upon which the Court of Claims apparently decided the case was that since the respondent in its sovereign capacity could revoke the export licenses in the interest of national defense and thereby prevent petitioner from delivering the copra and

thus securing the export price under its contracts of sale, that price does not constitute just compensation when respondent requisitions the copra although, except for plaintiff's inability, for lack of licenses, to make delivery, that price would have constituted just compensation.

Under these circumstances, the lower court's decision would make petitioner's loss a non-compensable damage. This was the theory of that court in the case decided by it November 3, 1947, *Neumaticos Goodyear S. A.* v. *United States* (Number 46,328 in that court), and in that case the court cited as authority for its ruling the decisions of this Court in *Horowitz* v. *United States*, 267 U. S. 458, and *Omnia Commercial Company, Inc.* v. *United States*, 261 U. S. 502. In the former case this Court held that where the Government in the exercise of its sovereign power had placed an embargo on the shipment of silk by freight, thus preventing the delivery of silk which the Government was obliged to deliver as a private person under a contract it had made, the contractor could not recover damages caused by the exercise of the sovereign power. In the latter case this Court held that the requisitioning by the Government of the output of a manufacturing company did not constitute a taking of a contract between the company and a third person.

Neither of these cases is applicable in the situation in the case at bar. In the case at bar respondent was acting as a sovereign both when it rescinded petitioner's licenses and when it requisitioned its copra.

Respondent's power to revoke export licenses was subject to no judicial control. Hence, if respondent could destroy the value of petitioner's copra by preventing the exportation, it could, to serve its own ends, however laudable, exercise that power to enable it to acquire the copra for public use at a price which would otherwise not constitute just compensation.

It is one thing to assert that citizens must bear the consequences of the proper exercise of sovereign power when the exercise does not result in the enrichment of the sovereign at the expense of the subject. It is quite another thing to assert that the sovereign may use its sovereign power to prevent a citizen from reaping the rewards of legitimate sales of merchandise and then enrich itself by exercising its sovereign power to requisition the same merchandise and avoid the payment of the value which it has destroyed by the exercise of its sovereign power.

Had respondent requisitioned plaintiff's copra without cancelling its export licenses, as it could have done, then respondent's argument, that the sales price did not constitute just compensation, because delivery to the foreign customers could not be made, would have been unavailable to it, because petitioner would then have been in a position to deliver the copra, and respondent would have been obliged to pay the export price. Respondent may not by the mere device of cancelling the export licenses thus avoid its obligation to pay just compensation.

The revocation of the export licenses did not change the *measure* of just compensation. The very fact that petitioner had the contracts for the sale of the copra in South America at the prices shown is clear evidence of the fact that copra was being sold in the export market at that price. Furthermore, there is other evidence that South American purchasers were willing and ready to pay $196.00 per long ton for copra (Plaintiff's Exhibits 45 and 52).

Finally respondent, had it chosen so to do, could unquestionably have sold the copra in the export market at $196.00 per long ton. This clearly indicates that respondent by its requisition acquired property of the value asserted by petitioner.

It is, therefore, respectfully submitted that petitioner was entitled to receive as just compensation for its copra the

price at which the copra had actually been sold, namely, $196.36 per long ton for 610 long tons and $182.00 per long ton for 812.223 long tons.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decision of the United States Court of Claims may be reviewed and the error committed by that Court corrected, and its judgment finally reversed with directions that petitioner was entitled to recover as just compensation for its copra $182.00 per long ton for 812.223 long tons and $196.36 per long ton for 610 long tons, and that to such an end a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 730

FOREIGN TRADE MANAGEMENT COMPANY, INCORPORATED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 12-15) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 15). A motion for a new trial was denied on March 11, 1948 (R. 15). On December 23, 1947, by order of the Chief Justice, the time for filing a petition for a writ of certiorari

was extended to and including April 15, 1948 (R. 18). The petition for certiorari was filed on April 9, 1948. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

In late 1941 and early 1942, petitioner contracted to and did sell certain quantities of Portuguese East African copra to South American purchasers at prices ranging from $135 to $145 a ton. Several months thereafter, it imported some 1,400 tons for transhipment to two of these customers at $182 and $196 a ton, but it was prevented from consummating these sales by the Government's revocation of the licenses required for such exports during wartime. The copra was thereafter requisitioned by the United States.

The question is whether the Court of Claims erred when, after it had held that just compensation should be determined by reference to the export rather than to the domestic copra market price, it rejected the prices of the two frustrated sales and relied on the prices at which the earlier contracts and sales had been made, as the measure of such export market price.

STATUTE INVOLVED

Sections 1 and 2 of the Act of October 10, 1940, as amended (c. 836, 54 Stat. 1090; c. 471, 56 Stat.

467; 50 U. S. C. App., Supp. III, 711, 712) read as follows:

> That whenever the President determines that it is necessary in the interest of national defense or prosecution of war to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies, necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been prohibited or curtailed in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress; 54 Stat. 714), as heretofore or hereafter amended, or any other law, he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of,

and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940.

SEC. 2. Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41(20) and 250, title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages.

STATEMENT

This case involves the requisition, in July and August of 1942, of certain quantities of copra, the raw material from which coconut oil and, ulti-

mately, soap, glycerin, and nitroglycerin are processed.

On January 12, 1942, by order of the Acting Director of Priorities (7 F.R. 223), private transactions in copra were subjected to the restrictions on importation and disposition which had theretofore been made applicable to other strategic materials of war (6 F.R. 6796, 7 F.R. 206). Thereafter, in May, 1942, the Combined Food Board for the Allied Nations so regulated the purchase and distribution of the world's fats and oils as to make it impossible for private persons to obtain copra for sale in the United States and South America except in Portuguese East Africa and Honduras (R. 9). Under the arrangements made, all purchases in the zone allotted to the United States were made by the Government itself, acting through Commodity Credit Corporation, and from May to December, 1942, that agency purchased 68,630 tons of copra at prices ranging from $95 to $129.60 a ton (R. 9, 10).[1] This copra was sold to crushers at the price of $106.25 per ton, and they were required then to resell the coconut oil extracted to the Government at the established ceiling price of 8 cents per pound (R. 9-10).

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[1] References in the record are uniformly to long tons. The quotations of prices vary, however, some being f.o.b New York, some f.a.s. New York, c.i.f New York, c.i.f. New Orleans, etc. Since the court below made no specific findings as to the costs of transportation, insurance, etc., the record affords no basis for equating the quotations, and we have therefore omitted the references to the terms of the sales.

The copra here in question was purchased by petitioner in Portuguese East Africa under a contract entered into on or about August 21, 1941 (R. 4). Petitioner is a New York import and export corporation, engaged, in part, in the sale of copra in foreign markets (R. 4, 7). The copra was purchased at $71 a ton, and, though it was destined for Colombia and Venezuela, the lack of ships plying between East Africa and South America compelled petitioner to arrange shipment through the United States, increasing the cost to petitioner, by the time the copra reached New Orleans, from which it was to be transhipped to South America, to $106.43 a ton (R. 4, 5, 7).[2]

At the time the copra was shipped from Portuguese East Africa, petitioner had contracts to sell between 6,000 and 7,000 tons to South American customers, and the shipment to New Orleans was

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[2] Petitioner's statement that the copra was originally destined to Trinidad and unloaded in the United States only upon the intervention of the Board of Economic Warfare because it was considering the requisitioning of all copra (Pet. 4-5, 19) has no support in the record and is wholly unwarranted. The transcript reference relied on (1 Tr. 23-28) does not deal with the subject at all, and Exhibit 53, also cited, was never properly received in evidence, for reasons which petitioner's counsel himself advanced. See 1 Tr. 151-156. On the other hand, all the documents affecting the shipment—the bills of lading, application for import shipping priority rating, application for export licenses, financing arrangements, etc.—demonstrate that the arrangements made were that the copra was to be delivered to New York (Plff's. Exs. 8, 14, 15, 16, 17). And there is nothing in the record to indicate that these arrangements were inspired by the Board of Economic Warfare or that any different arrangements for unloading the cargoes were at any time made or approved by the appropriate governmental authorities.

for the purpose of exporting the copra from that port to South America (R. 4, 7). After the copra arrived at New Orleans, export licenses were granted authorizing petitioner to ship 840 tons to Banco Mercantil Agricola, Puerto Cabello, Venezuela, and 610 tons to Industria Refinadora Nacional Ltda., Cartagena, Colombia (R. 7).[3] By contract, the Venezuelan consignee had agreed and was financially able and willing to pay $182 a ton for the copra; and the Colombian purchaser, $196.36 a ton (R. 8). Four days after they had been granted, the export licenses were revoked, and petitioner's repeated requests for their reinstatement were denied (R. 7). There were two reasons for cancellation: (1) petitioner had represented in its application for the licenses that the value of the copra was considerably less than the prices at which it had contracted to sell it, and (2) it had been reported that the potential consignees

[3] Wartime restrictions made it impossible for copra to be exported from the United States except on special licenses. Section 6 of the Act of July 2, 1940 (54 Stat. 712) authorized the President, by proclamation, to prohibit or curtail the exportation of military supplies whenever he determined that it was necessary to do so in the interests of national defense. By Proclamation 2413, issued on July 2, 1940, the President determined that certain products and materials should not be exported from the United States except when authorized by a license issued by the Secretary of State (5 F.R. 2467), and regulations governing the exportation of those articles were issued the same day (5 F.R. 2469). By Proclamation 2463, issued on March 4, 1941, the President determined that it was necessary, in the interests of national defense, that copra (as well as glycerin and coconut oil, products processed from copra) should not be exported except when authorized by license, as provided in Proclamation 2413 (6 F.R. 1299).

were on the proclaimed list of persons believed to be dealing with our enemies (R. 7-8).[4]

Although for some three years prior to Pearl Harbor, the market for copra had been stable, the prices ranging between $36.50 and $50.00 a ton, the price began to advance appreciably about that time (R. 10). Just prior to and immediately following Pearl Harbor, petitioner entered into contracts for the sale of Portuguese East African copra to certain Colombian and Venezuelan purchasers—among them the two proposed consignees of the requisitioned copra—at prices ranging from $135.00 to $145.00 a ton, and in March, 1942, petitioner shipped to Colombia approximately 390 tons of copra, which had been sold in 1941, for $140.00 a ton (R. 8, 9).[5]

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[4] Apparently it was not so much the fact of misrepresentation of value as of exorbitance of price which impelled the revocation of the licenses. The State Department believed that the good neighbor policy required the Government to prevent exporters in the United States from overcharging South American consignees, and, therefore, licenses were denied exporters where the prices were deemed unreasonably high (R. 13, Tr. 774-776).

The refusal to grant export licenses for shipments to persons on the proclaimed list was, of course, in order to insure that strategic materials would not be diverted to potential or declared enemies of the United States. There is no question that the officers in charge of export licensing were officially advised that petitioner's consignees were on the proclaimed list (R. 8), and, notwithstanding petitioner's suggestion to the contrary (Pet. 3), there is nothing in the record to indicate that was not the fact.

[5] In the middle of 1942, a contract of sale was entered into for the purchase of 150 tons at $188.00 a ton, but this transaction was not carried through because shipping facilities could not be obtained (R. 9). During 1944, petitioner had six contracts for the sale of copra to South American firms at from $240.00 to $245.00 a ton, and an export license was granted to one of petitioner's subsidiaries for the shipment of 1,000 tons to Columbia at $240.00 a ton (R. 9).

On July 24 and August 7, 1942, pursuant to requisitions issued by the Board of Economic Warfare under the authority of the Act of October 10, 1940, as amended, *supra,* pp. 2-4, respondent took possession of an aggregate of 1422.223 tons of the copra which was being held in New Orleans for petitioner (R. 5). Petitioner filed a claim, requesting compensation at the rates of $182 and $196.36 a ton, the prices at which it had contracted to sell the copra (R. 5-6). A hearing having been held before its Compensation Board, the Board of Economic Warfare, on March 15, 1943, rejected petitioner's claim and determined that the fair and just compensation for the requisitioned copra was $155,597.33, computing the compensation at the rate of $106.25 a ton, the price at which Commodity Credit Corporation was selling copra in the domestic market (R. 6). The liens to which the copra was subjected were paid off and the balance awarded to petitioner, but it elected to reject the award on the ground of inadequacy and to take only 50 per cent., reserving its rights to proceed in the Court of Claims (R. 5, 6-7).

On July 10, 1943, petitioner filed its petition in the Court of Claims (R. 1-3), and a general traverse having been filed (R. 3), testimony taken, and the case argued and submitted, the court, on December 1, 1947, filed its special findings of fact (R. 4-12), conclusion of law, (R. 12), opinion (R. 12-15), and judgment (R. 15). The court decided that petitioner was entitled to the "ex-

port market price" for the copra taken, but concluded that $145 a ton was the "export market price" at the time of the requisition (R. 13-14). A motion for a new trial thereafter made by respondent was denied (R. 15).

ARGUMENT

Respondent believes that the court below erred when it awarded petitioner an "export market price" for the requisitioned copra. The record fails to show any exportation of copra at the time of the requisition significant enough to constitute a "market." The only market then available appears to have been the domestic one, and it is the price there which should have controlled.

Petitioner, however, does not quarrel with the court's ruling in that respect. Its only complaint is that the court calculated the "export market price" by reference to certain contracts and sales made some months prior to the requisition rather than to the contracts, frustrated by governmental regulation, by which petitioner had agreed to sell the particular copra requisitioned. If we accept the court's rule of just compensation, however, as does petitioner, it seems quite proper to have relied on transactions other than those which were prohibited by the Government's export regulations, in part, at least, because of the exorbitance of the contract prices involved. We submit that there is no showing that the judgment below does not afford petitioner just compensation and that

the question raised by the petition is not of such importance as to warrant review by this Court.

It is clear, of course, that petitioner is not entitled to receive the prices at which it had contracted to sell the requisitioned copra merely because performance of those contracts was frustrated by the Government. The United States requisitioned the copra, not the contracts of sale. Compare *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, with *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106. In those circumstances, as this Court indicated in *Omnia Commercial Co.* v. *United States, supra,* at 511, the contractor is entitled "not to the price fixed by the contract but to the just compensation guaranteed by the Constitution". Furthermore, it was not the requisition but, rather, the denial of export licenses which prevented petitioner from carrying out the contracts, and whatever damages and losses may have resulted from such interference are not legally compensable. *Bowles* v. *Willingham,* 321 U. S. 503, 517-519; *Omnia Commercial Co.* v. *United States, supra; Morrisdale Coal Co.* v. *United States,* 259 U. S. 188. For "* * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose * * *." *United States ex rel. T.V.A.* v. *Powelson,* 319 U. S. 266, 281-282.

Petitioner, then, is entitled to no more than the value of the copra taken. And since the criterion

which the courts normally employ for determining just compensation is the market value of the property at the time of taking (*Albrecht* v. *United States,* 329 U. S. 599, 602; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377; *United States* v. *General Motors Corp.,* 323 U. S. 373, 379; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 275), this case comes down merely to the question of ascertaining such value. In discovering the market value, it seems as relevant to consider the prices fixed in contracts and sales some months prior to the requisition as those at which petitioner contracted to sell the particular copra involved. Moreover, since the latter were so high that the necessary licenses for sales at those levels were denied petitioner, the court was fully justified in rejecting them as indicia of actual market conditions. In any event, as this Court has remarked, "* * * even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety * * *" and all that can be expected in eminent domain proceedings is that "substantial justice" will be done. *United States* v. *Miller,* 317 U. S. 369, 374, 375. We submit that, so far as the determination of "export market price" is concerned, substantial justice has been achieved.

The issue which the petition raises is, at most, a factual one, limited in its application to this case.

It has no general importance. Consequently, review by this Court seems unwarranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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